SUPERIOR COURT NO. 95-1-415-9
COURT OF APPEALS NO. 47251-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent.

Vs.

BRIAN M. BASSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY
The Honorable David Edwards Judge

REPLY OF APPELLANT

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TABLE OF AUTHORITIES

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MISCELLANEOUS

I. STATEMENT OF THE CASE IN REPLY

In 1996, shortly after he turned 16 years old, Brian Bassett, along with an older co-defendant, was convicted of aggravated first-degree murder in the deaths of his parents and younger brother.[1]

Prior to the homicides, Mr. Bassett had never been convicted of a crime, was living as a homeless child, and often slept in an empty baseball dugout in a local park. RP 1-30-15, p. 43, 66, 80; CP 261. Mr. Bassett's parents had rejected his attempt to reconcile with them. RP 1-30-15, p. 41-43. Mr. Bassett had an uncontrolled substance abuse problem and had been hospitalized as the result of an alcohol overdose. RP 1-30-15, p. 36-37. The pediatric psychologist Mr. Bassett had been seeing prior to the homicides had preliminarily diagnosed him as suffering from an Adjustment Disorder. RP 1-30-14, p. 44-47.

Mr. Bassett was convicted following trial and, pursuant to RCW 10.95.030, was sentenced to serve three mandatory consecutive terms of life in prison. (Judgment and Sentence, April 1, 1996, *State v. Bassett.* 95-1-415-9.)

1. Mr. Bassett's older co-defendant, Nicholas McDonald, admitted to police that he had been the one who killed Mr. Bassett's younger brother by drowning him in a bathtub at Mr. Bassett's parent's house. Brief of Respondent, p. 2, citing to *State v. McDonald*, 90 Wn. App. 604 (1998), RP 1282.

In 2012 the U.S. Supreme Court, in *Miller v. Alabama*,[2] recognized that, because of the distinct differences between adult and juvenile offenders, mandatory sentences of life in prison for juveniles violated the constitutional prohibition against cruel and unusual punishment. Pursuant to the *Miller* decision, the Washington legislature amended RCW 10.95.030 and required that judges sentencing juveniles who are facing the possibility of life in prison give meaningful consideration to mitigating information and the juvenile's chances at rehabilitation. As a result of the statutory amendment, Mr. Bassett received a new sentencing hearing.

Much had changed with Mr. Bassett in the 20 years since he, as a troubled, homeless, addicted, 16-year old boy, had been sentenced to die in prison. For example, Mr. Bassett had been baptized. RP 22-23. He earned his GED. CP 190-91. He continued his education and succeeded in making the academic honor roll at Edmonds Community College. CP 195. He earned certifications in Carpentry, Plumbing, and HVAC Maintenance. CP 232. He completed numerous classes designed to help him understand the dynamics of violence that may have contributed to the crimes he'd committed as an adolescent. CP 279, 207. He served as a mentor to other inmates. CP 263-293 (letters of support for Mr. Bassett). He married a

2. __ U.S. __, 132 S. Ct. 2455 (2012).

wonderful woman. RP 19-27. He had not violated a single prison rule in the previous 12 years, CP 207, and, despite having been convicted of aggravated murder, he was classified by the DOC as moderate to low security risk. CP 188, RP 1-30-15, p. 29.

On January 30, 2015, Mr. Bassett appeared in Grays Harbor Superior Court for re-sentencing pursuant to the amendments to RCW 10.95.030. Mr. Bassett submitted a large mitigation package, and his wife and a pediatric psychologist testified about the mitigating factors contributing to his decades old crimes and about how Mr. Bassett had changed, matured, and been rehabilitated during the intervening 20 years he'd spent in prison.

At Mr. Bassett's re-sentencing hearing, the prosecutor did not present any evidence or testimony in rebuttal to either Mr. Bassett's submissions or the witnesses who testified on his behalf. RP 1-30-15, p. 51.

Contrary to the evidence presented, Mr. Bassett's judge re-sentenced Mr. Basset to serve three consecutive terms of life in prison without the possibility of parole, the same sentence Mr. Bassett had received two decades earlier as a 16-year old boy. RP 1-30-2015, RP 93.

II. ASSIGNMENTS OF ERROR

The Appellant's Assignments of Error are listed in detail in pages 1 and 2 of the Brief of Appellant and are incorporated herein by this reference.

III. STATEMENT OF THE ISSUES IN REPLY

A. Whether this court should treat material issues raised in the Brief of Appellant as conceded when the Respondent failed to dispute those material issues in their response brief.

B. Whether the Appellant has the right to appeal an unconstitutional sentence.

C. Whether RCW 10.95.030 violates the constitutional prohibition against cruel and unusual punishment when it fails to comply with the requirements by the U.S. Supreme Court in *Miller v. Alabama* and *Montgomery v. Louisiana*

1. Whether RCW 10.95.030 is unconstitutional because it violates the Appellant's Right to a Jury Trial.

D. Whether the Appellant should receive a new sentencing hearing because his sentencing judge failed to give meaningful consideration to mitigating information as required by *Miller* and *Montgomery*.

E. Whether the Appellant's sentencing judge improperly presumed life in prison to be the appropriate sentence for juvenile offenders convicted of aggravated murder.

IV. ARGUMENT IN REPLY

A. The Respondent failed to dispute several material issues raised by the Appellant and those undisputed issues should be deemed conceded.

The Respondent failed to contest or dispute the following material legal issues raised in the Brief of Appellant:

1. The Appellant asserted that because amended RCW 10.95.030(3)(a)(ii) authorized life in prison as a minimum sentence for juvenile offenders like Mr. Bassett, the statue violates the prohibition against Cruel and Unusual punishment contained in the Eight Amendment and also violates the broader protections provided by Washington's constitutional prohibition against "Cruel Punishment."[3] See, Brief of Appellant, p. 7 -18.

The Respondent did not dispute the Appellant's assertions.

2. The Appellant asserted that Mr. Bassett's sentencing judge erred by imposing a life sentence without requiring proof beyond a reasonable doubt that such a sentence was appropriate. See e.g. *State v. Hart*, 404 S.W. 3d

3. "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." WASH Const. Art. 1, §14. Based on the differences in text and history between the Eighth Amendment and Article I, Section 14, Washington's Supreme Court has repeatedly held that Article I, Section 14 provides an even greater protection against cruel punishment than its federal counterpart. *State v. Fain*, 94 Wn.2d at 393; *State v. Thorne,* 129 Wn.2d 736, 772 (1996); see also, *State v. Roberts*, 142 Wn.2d 471, 506, n. 11 (2000) (This "established principle" requires no analysis under *State v. Gunwall*, 106 Wn.2d 54 (1986).

232, 241 (Mo. 2013) ("[A] juvenile offender cannot be sentenced to life without parole for first degree murder unless the State persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances"). See, Brief of Appellant, p. 21-22.

The Respondent did not dispute the Appellant's assertion.

3. The Appellant asserted that Mr. Bassett is entitled to a new sentencing hearing because the sentencing judge erred when he improperly used a mitigating factor as a means of aggravating Mr. Bassett's punishment. See, Brief of Appellant, p. 37-40.

The Respondent did not dispute that assertion.

In order to find that RCW 10.95.030 complies with due process and constitutional guarantees against cruel punishment, and in order to find that the Appellant's sentencing hearing met constitutional standards, the material issues noted above must be decided against the Appellant and in favor of the Respondent. Further, it was not possible that the Respondent read the Brief of Appellant and simply overlooked those material issues. Accordingly, the only reasonable conclusion is that the Respondent consciously chose not to dispute those material issues.

When, as occurred here, the Respondent submits a brief but chooses not to dispute material issues contained in an opponent's brief, the court

should not take up a position on the Respondent's behalf, but should instead grant the relief requested by the Appellant as to those undisputed issues. See, *Bolt v. Hurn,* 40 W. App. 54, 60 (1995) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief); *Sehulster Tunnels v. Traylor Brothers, et al*, 111 Cal. App. 4Th 1328, 1345 fn. 16 (2003) (granting relief based on Respondent's failure to dispute a material issue in its response brief); see also, RAP 11.2(a) (providing that a party who fails to file a brief is not entitled to engage in oral argument). Accordingly, this court should treat the undisputed, material issues identified above as conceded by the Respondent and should grant the Appellant's request for a new sentencing hearing.

B. A defendant has a right to appeal in a criminal case.

The amendments to RCW 10.95, the statutory scheme under which Mr. Bassett was sentenced, are constitutionally flawed in a variety of ways, as discussed below.

In response to Mr. Bassett's appeal, the Respondent unilaterally asserts and then treats that appeal as though it were a Personal Restraint Petition. In support of its argument, the Respondent relies exclusively on RCW 10.95.035. However, the Respondent does not address how RCW 10.95.035 would take precedence over the constitutional mandate announced in Article I, Section 22 of the Washington Constitution, which

provides: "In criminal prosecutions the accused shall have... the right to appeal in all cases."

Our state constitution provides a right to direct appeal in criminal cases. *State v. Sims*, 171 Wn. 2d. 436, 444 (2011). See also, *Marbury v. Madison*, 5 U.S. 137, 176, 2 L. Ed. 60 (1803) ("The powers of the legislature are defined and limited; and that those limits not be mistaken or forgotten, the constitution is written). The Respondent has not presented any argument to justify depriving Mr. Bassett of that constitutional right.

C. *Montgomery v. Louisiana*, confirmed that, as argued in the Brief of Appellant, RCW 10.95. 030 is unconstitutional.

After the Appellant filed his opening brief, but a month and a half before the Respondent filed its response, the U.S. Supreme Court decided *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718 (Jan. 25, 2016). Initially, *Montgomery* declared that the principles announced in *Miller v. Alabama,* 132 S. Ct. 2455 (2012) must be applied retroactively when a juvenile challenges a life sentence under the Eighth Amendment. *Montgomery*, 136 S. Ct. at 731-732. But *Montgomery* did much more than that. One court recognized that *Montgomery* announced a "heretofore unknown constitutional standard" in cases involving juvenile life in prison

sentencing.[4] The *Montgomery* dissent even questioned whether the majority decision had eliminated life without parole as a sentencing option for juvenile offenders.[5]

Despite the significance of the *Montgomery* decision to Mr. Bassett's appeal (and all juvenile's facing life in prison), and although the Respondent had ample time to address the impact of the *Montgomery* decision, the Respondent limited its analysis of *Montgomery* to a single sentence in a footnote. See, Brief of Respondent, p. 9, fn. 6.

Montgomery is significant because it clarified that "*Miller* announced a substantive rule of constitutional law," that "the sentence of life without parole is disproportionate for the vast majority of juvenile offenders," and, that life sentences for juvenile offenders should be "uncommon" defining uncommon as meaning "exceptionally rare," to be imposed upon the rarest juvenile offender who exhibits such "irretrievable depravity" that rehabilitation is impossible. *Montgomery*, 136 S. Ct. at 733-36.

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4. State v. Valencia, __ Az. 2d__, __ P. 3d __, 16 WL 1203414; also, *Montgomery*, __ U.S. ___, 136 S. Ct. at 743 ("It is plain as day that the majority is not applying *Miller,* but re-writing it." Scalia, J., dissenting); *Peolee v. Nieto*, __ Ill. App. ___, __ N.E. 3d__, Slip op 16. ("Following *Montgomery*, we agree there is more to *Miller*.")

5. Justice Scalia observed that the majority's reasoning can be read as a "way of eliminating life without parole for juvenile offenders." *Montgomery*, 136 S. Ct. at 744 (Scalia, J. dissenting.)

Interpreting *Miller*, the *Montgomery* court explained that a juvenile life without parole sentence violates the prohibition against cruel and unusual punishment unless the sentencer makes a determination – after first giving mitigating effect to the circumstances of youth identified in *Miller* - that the particular juvenile's crime reflects "irreparable corruption." *Montgomery,* 136 S. Ct. at 733-34; *Veal v. State*, __ Ga. __, ___ S.E. 3d. __. 2016 WL 1085360 (2016) (attached as Appendix A); *State v. Valencia*, __ Az. 2d__, __ P. 3d __, 16 WL 1203414 (attached as Appendix B). [6]

The *Veal* case, decided shortly after *Montgomery*, involved a post - *Miller* juvenile sentencing statute that, like RCW 10. 95. 030, provided a judge with discretion to impose a juvenile life sentence so long as the sentencer followed the process described in *Miller* of considering the characteristics of youth. *Veal*, ___ S.E. 3d. __, Slip op. at 14-15. In fact, the court in *Veal* observed that, but for the standard announced in *Montgomery*, the juvenile life sentence imposed in *Veal* might have been upheld because it appeared to comply with the process described in *Miller*.

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6. In pages 20-24 of its brief, the Respondent proposes that a sentencing judge can constitutionally sentence a juvenile to life in prison without first determining that the juvenile is "irreparably corrupt." However, the Respondent does not address the contrary indication in *Miller* (See, *Miller*, 132 S. Ct. at 2469) and ignores the clear holding of *Montgomery.* In support of its proposition the Respondent relies only cases decided prior to *Montgomery.* Both *Veal* and *Valencia* make clear that after *Montgomery* the Respondent's position violates the constitutional prohibition against cruel and unusual punishment.

Slip op. at 14-15, 16. But, the *Veal* court remanded for a new sentencing hearing because,

> [t]he trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery.*
>
> *State v. Veal*, __ Ga. ___, __ S.E. 3d ___, Slip op at 23.

The court in *State v. Valencia*, __ Az. 2d__, __ P. 3d __, 16 WL 1203414, recently reached a similar conclusion. Again, after recognizing the significant impact of *Montgomery,* the *Valencia* court rejected argument by the prosecutor that the juvenile life sentence imposed in that case was constitutional because the statute under which the defendant was sentenced provided the sentencer with discretion to consider the attributes of youth required under *Miller*. The *Valencia* court remanded for re-sentencing, concluding that, after *Montgomery*, a juvenile life without parole sentence requires a finding of "permanent incorrigibility." *Valencia*, __ P. 3d__, slip op. p. 5 (citing to *Montgomery,* 136 S. Ct. at 735, 736).

Like the statutes as issue in both *Veal* and *Valencia,* RCW 10.95.030, the statute used to sentence Mr. Bassett, advised Mr. Bassett's judge to consider the *Miller* factors and it provided the judge with some

discretion as to sentence. However, like the statutes in both *Veal* and *Valencia*, RCW 10.95.030 is silent as to the additional requirement that the court find permanent incorrigibility. The Washington statute is misleading as to when juvenile life without parole may be imposed because it doesn't inform the court that life without parole for a juveniles is unconstitutional without a finding that a child is "irreparably corrupt." A sentence imposed in violation of the "substantive rule" announced in *Montgomery* is not just erroneous but contrary to the law and, as a result, void. See, *Montgomery,* 136 S. Ct. at 731.

Mr. Bassett's sentence was unconstitutional and his case should be remanded for re-sentencing.[7]

1. In addition to being unconstitutional pursuant to *Montgomery*, RCW 10.95.030 is unconstitutional because it violates the Appellant's Right to a Jury Trial.

Contrary to the position the Respondent takes at pages 7-13 of their brief, Mr. Bassett has a right under the Sixth Amendment to the U.S. Constitution and under Article I, Sections 21 and 22 of the Washington

7. Both *Veal* and *Valencia* were decided based on Eighth Amendment notions of cruel and unusual punishment. However, as noted in footnote 1, *supra.*, Article I, section 14 of the Washington Constitution provides an even greater constitutional protection against "cruel punishment" than its federal counterpart. Although the Respondent did not address the Appellant's state constitutional argument, it follows that what was true in *Veal* and *Valencia* regarding the Eighth Amendment is even more so under Article I, section 14. See also, Brief of Appellant, p. 7-17 (discussing how RCW 10.95.030 violates Washington's state constitutional prohibition against "cruel punishment").

Constitution, to have a jury decide if he is one of the "extraordinarily rare" juvenile's so "irreparably corrupt" that he deserves a sentence that he die in prison.

In instances where an enhanced sentenced is authorized only if a certain fact outside the jury verdict is established, then the defendant can only be exposed to the enhanced sentence if a jury finds that certain fact beyond a reasonable doubt. See, *U.S. v. Booker,* 543 U.S. 220, 244 (2005); see also, *Allyne v. U.S.*, 570 U.S.__, 133 S. Ct. 2151, 2162 (2013). In accord with *Miller* and *Montgomery,* for a juvenile life without parole sentence to pass constitutional muster requires a factual finding that the juvenile offender is "irreparably corrupt." See, *Miller*, __ U.S. __, 132 S. Ct. at 2469; *Montgomery*,136 S. Ct. at 735. However, in Washington, when determining whether a defendant is guilty of aggravated murder, a jury is not asked to address the factual issue of whether the defendant is "irreparably corrupt." That additional factual finding of irreparable corruption triggers the constitutional right to a jury. See e.g. *People v. Skinner*, 312 Mich. App. 15,__ NW2d __, 2015 WL4945986 (2015) ("The Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a

sentence of life without the possibility of parole have a right to have their sentence determined by a jury").[8]

Accordingly, Mr. Bassett should receive a new sentencing hearing wherein a jury determines whether or not he is one of the exceptionally rare cases involving an irreparably corrupt juvenile.

D. Mr. Bassett's sentencing hearing did not comply with constitutional requirements announced in either *Miller* or *Montgomery*

The Respondent argues, at pages 15-18, essentially that, because RCW 10.95.030(3) does not mandate a life sentence, and because the statute advises a sentencer to consider the diminished culpability of youth as provided in *Miller*, the sentence imposed in Mr. Bassett's case was constitutional. As proof, the Respondent quoted Mr. Bassett's sentencing judge's explanation of what *Miller* required. However, a sentencing judge's

8. The Respondent, at p. 21-23 of its brief, argues that a finding of irreparable corruption is unnecessary in order to sentence a juvenile to serve life in prison. The Respondent does not address *Montgomery's* contrary holding and instead relies only on *State v. Ramos*, 189 Wn. App. 431 (2015), *rev. granted* __ P. 3d __ (March 2016) - a Division Three case where review was granted once *Montgomery* was announced - and *People v. Perkins*, ___ N.W. 2d ___ (Mich. Ct. App. Jan. 16, 2016) a Court of Appeals case from Michigan. Both *Ramos* and *Perkins* were decided before *Montgomery* "re-wrote *Miller*" (see, footnote 4, *supra*) and therefore the sustainability of both cases is questionable. For example, as the Respondent points out at page 23 of its brief, the *Ramos* court relied on the penological goal of incapacitation to support its decision to uphold a juvenile life equivalent sentence for Ramos (*Ramos*, at 451) but, *Montgomery* subsequently declared that the four traditional penological justifications can no longer be said to support juvenile life sentences in light of "the distinctive attributes of youth." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 132 S. Ct. at 2465).

awareness of what *Miller* required is altogether different from establishing that the judge actually complied with those requirements.

When sentencing a juvenile, the mere mention by a sentencer of youth or the factors discussed in *Miller,* are insufficient to establish that the sentencer in fact gave actual and appropriate weight to the mitigating characteristics and potential for rehabilitation of the juvenile at issue. *Montgomery*, 136 S. Ct at 733-34; see also, *State v. Nieto*, __ Ill. App. ___, __ N.E. 3d__, (3-23-16) (citation omitted) (citing to *Montgomery* and remanding for re-sentencing based on the sentencing court's failure to apply and comprehend mitigating factors when imposing a juvenile life equivalent sentencing); accord, *State v. Riley,* 110 A. 3d 1205, 1217-18 (Conn. 2015) (remanding for re-sentencing because "the record does not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features").

In short, in addition to the finding of "irreparable corruption," required by *Montgomery* and followed in *Veal*, and *Valencia*, a constitutional juvenile life sentence requires proof the sentencer actually gave individualized effect to the characteristics of youth and potential for rehabilitation described in *Miller. Montgomery,* 136 S. Ct. at 734. In Mr. Bassett's case the sentencing court failed to apply and comprehend mitigating information about Mr. Bassett or his potential for rehabilitation.

The Respondent, in support of its argument that the sentencing court in Mr. Bassett's case considered *Miller* type information, informs this court that "[t]here was no argument [by the Appellant] ...that the court refused to consider relevant mitigation evidence." Brief of Respondent, p. 17. In fact, the Appellant repeatedly argued that the sentencing court refused to consider mitigating evidence.[9] See e.g. Brief of Appellant, p. 22 ("Mr. Bassett's sentencing judge erred by failing to give meaningful consideration to mitigating information and 'individualized sentencing"); also, Brief of Appellant, p. 31-36 (discussing the sentencing court's abuse of discretion for its failure to give "meaningful consideration" to the mitigating testimony of pediatric psychologist Dr. Jeffery Hansen).

In addition, the Appellant argued that Mr. Bassett's sentencing judge improperly used mitigating information to aggravate punishment when he announced his erroneous belief that, because Mr. Bassett was a homeless child, he must be more mature than a child who was not homeless, apparently making Mr. Bassett more deserving of a life sentence. Brief of Appellant, 38-39; RP 1-30-15, p. 88; See, *McClesky v. Kemp*, 481 U.S. 279, 304 (1987) (Eighth Amendment requires compassionate or mitigating factors about a defendant not be used as arguments for death).

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9. See generally, Brief of Appellant, pages 22-42 for detailed discussion of how the sentencing court refused and/or failed to meet even the pre-*Montgomery* standards for individualized sentencing required by *Miller*.

Contrary to the position of the Respondent, the Appellant also argued it was improper for Mr. Bassett's sentencing judge to support imposition of a life sentence based on his incorrect belief that Mr. Bassett's parents had tried to reconcile with him – when, in fact, it was Mr. Bassett who had tried to reconcile with his parents, but his mother had rejected his effort. Brief of Appellant, p. 34-36; RP 1-30-15, p. 43-44.

In addition, the Appellant argued that Mr. Bassett's sentencing judge went to unreasonable lengths to discredit or discount evidence of Mr. Bassett's potential for rehabilitation and his impressive and significant post-incarceration accomplishments. See, e.g. Brief of Appellant, p. 41-46.[10]

The simple fact remains that, while Mr. Bassett's judge appeared aware of his pre-*Montgomery* sentencing obligations under *Miller*, he cfailed to meet them.

In fact, based on the sentencing court's failure to accurately comprehend and apply much of the mitigating information presented on Mr. Bassett's behalf, it appears the sentencing court evaluated the mitigating information about Bassett as though it were part of a request for an

10. E.g., Brief of Appellant, p. 42 (Mr. Bassett's sentencing judge refused to credit Mr. Bassett's twelve consecutive years of rules compliance); p. 43, (Mr. Bassett's sentencing judge opining Bassett's educational accomplishments weren't evidence of rehabilitation but just an effort to avoid boredom); p. 45 (Mr. Bassett's sentencing judge dismissing the value of Bassett's marriage by opining Bassett's wife, [who had a previous been divorce] had a "history of dysfunctional relationships").

exceptional sentence below the standard sentence range proffered under the Sentence Reform Act, RCW 9.94A.[11] However, Mr. Bassett was not making a request for a downward departure under the SRA. Mr. Basset was presenting mitigating information pursuant to RCW 10.95, a process that required Mr. Bassett's sentencing judge to apply a standard very different from the one it would apply under the SRA. *Compare* RCW 9.94A.535(1) (standards for the court granting an exceptional sentence downward) with RCW 10.95.060(4) and WASHINGTON PATTERN INSTRUCTION CRIMINAL 31.07 at p. 357 (2d 1994) (defining mitigating circumstance).[12]

The Respondent, in its brief, elected not to address the effect of *Montgomery*, instead limiting its argument to the assertion that the Appellant's sentencing hearing complied with constitutional requirements of *Miller* and that the Appellant was therefore properly sentenced to die in prison. See, Brief of Respondent 15-20. As noted herein, Mr. Bassett's sentencing hearing failed to comply with *Montgomery* but also, contrary to

11. See, e.g. Brief of Appellant, p. 22-30 (Bassett's sentencing judge concluding that life in prison was appropriate for Bassett in part because the court did not have proof of Bassett's "adolescent brain taking over his decision making").

12. A mitigating circumstance is a fact either about the offense or about the defendant which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than [life without parole for a juvenile offender], although it does not excuse or justify the offense."

the Respondent's assertion, it failed to even comply with *Miller*. Therefore, Mr. Bassett should be granted a new sentencing hearing.

E. *Miller* and *Montgomery* require that a sentencing judge to presume that a sentence of less than life in prison without parole for juvenile offenders.

The Respondent asserts in its brief at p. 19-20 that the "defendant alleges without argument or explanation, that the court must 'presume' that LWOP is not the appropriate sentence in this case." The Respondent's assertion is not accurate. See Brief of Appellant, p. 21-22.

Both *Miller* and now *Montgomery* make clear that a juvenile life without parole sentence must be uncommonly imposed, and that such a sentence will be constitutionally justified only in the "exceptionally rare," instance where the offender has been found to be irredeemable. See, *Miller,* 132 S. Ct. at 2469; also, *Montgomery,* 136 S. Ct. at 736. A sentencing court cannot presume that *every* juvenile facing a potential life sentence that appears before the court is one of the "exceptionally rare" for whom life in prison without parole is appropriate. Because such juveniles will be "exceptionally rare," a court faced with sentencing a juvenile to life in prison must begin from the position that the juvenile before the court is not one of the "exceptionally rare" and, therefore, that the appropriate sentence

will not be life in prison, but will instead be one that provides a meaningful opportunity for release pursuant to the *Miller* factors.[13]

Instead, Mr. Bassett's judge approached his sentencing by assuming that life in prison without parole was appropriate for Mr. Bassett. For example, before he would impose a sentence other than life in prison, Mr. Bassett's judge was waiting for proof from Mr. Bassett that he had been afflicted by some mental infirmity or irresistible impulse (more significant than those accompanying youth) that caused the homicides. See RP 1-30-15, at p. 85 (Mr. Bassett's judge justifying consecutive life sentences by explaining Bassett's acts were not reflective of Bassett having "snapped" or acted on impulse); RP 1-30-15 at p. 86 (Mr. Bassett's judge justifying consecutive life sentences by explaining he didn't find Bassett's conduct was brought about by an emotional reaction to a particular event).

Mr. Bassett's sentencing judge erred by failing to presume some sentence other than life without parole to be appropriate for Mr. Bassett. Therefore, Mr. Bassett is entitled to be re-sentenced in a court where the

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13. The prosecutor has the burden of proving the juvenile is one of the "exceptionally rare" instances where life in prison is appropriate. See, *Montgomery*, 136 S. Ct. at 735. Also, *State v. Hart*, 404 S.W. 3d 232, 241 (Mo. 2013)("[A] juvenile offender cannot be sentenced to life without parole for first degree murder *unless the state persuades the sentencer* beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.") (emphasis added). In Mr. Bassett's case, the parties agreed to present the court with a redacted version of Mr. Bassett's prison record, but otherwise the prosecutor, who had the burden of proof, presented no evidence and no testimony to contradict Dr. Hansen or Ms. Pfeifer. RP 1-30-15, p. 51. In other words, the prosecutor failed to meet its burden in Mr. Bassett's case.

appropriate presumption against juvenile life in prison without parole is applied.

V. CONCLUSION

The Respondent failed to dispute material issues contained in the Brief of Appellant. Those issues should be deemed conceded and Mr. Bassett's case should be remanded for re-sentencing.

The statute under which Mr. Bassett was sentenced did not comply with the constitutional requirements the U.S. Supreme Court announced in either *Miller* or *Montgomery*.

Mr. Bassett's sentencing judge failed to properly apply required principles of individualized sentencing and failed to comprehend and properly apply mitigating information and information about Mr. Bassett's potential for rehabilitation.

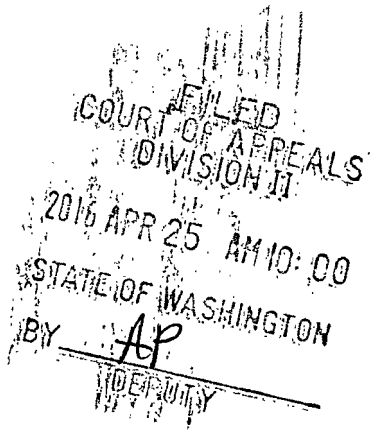
For the reasons noted herein, Mr. Bassett is entitled to a new sentencing hearing. Mr. Bassett's new sentencing hearing should be held before a judge other than the judge who previously sentenced Mr. Bassett to life in prison. Even if it appeared that Mr. Bassett's former sentencing judge was ready and willing to alter the previously imposed life sentence, or if he declared he could set aside his previously expressed views and impose sentence as though the prior proceedings had not occurred, the appearance of fairness requires that Mr. Bassett's re-sentencing be set in

front of different judge. See, e.g. *State v. Aguilar-Rivera*, 83 Wn. App. 199, 202-03 (1996); *State v. Crider*, 78 Wn. App. 849 (1995); and see, *State v. Talley*, 83 Wn. App. 750, 763 (1996); *In re Ellis*, 356 F. 3d 1198, 1211 (9th Cir. 2004); *State v. Sledge*, 133 Wn.2d 828, 846 (1997); *State v. Ryna Ra*, 142 Wn. App. At 885; *Milwaukee Railroad v. Human Rights Commission*, 87 Wn.2d 802, 808 (1976); *Sherman v. State*, 128 2d at 206; *In Re Custody of R,* 88 Wn. App. 746, 763 (1997).

Respectfully Submitted, this 18th day of April 2016.

Eric W. Lindell

ERIC W. LINDELL WSBA#18972



IN THE SUPERIOR COURT, STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, vs. BRIAN M. BASSETT, Defendant.	Superior Court No: 95-1-415-9 Court of Appeals No: ~~46468-3-II~~ 47251-1 PROOF OF SERVICE

PROOF OF SERVICE

I certify that on the dates noted below, I caused to be delivered, via email, a copy of the Reply of Appellant in the above-referenced matter, upon the following persons and/or parties:

David Ponzoha Clerk of the Court Court of Appeals, Division II 950 Broadway, Ste 300, MS TB-06 Tacoma, WA. 984025-4454 coa2filings@courts.wa.gov April 18, 2016 US Mail - April 22, 2016	Katherine Svoboda - April 18, 2016 Prosecuting Attorney Grays Harbor County Courthouse 102 West Broadway, Room 102 Montesano, WA 98563 Ksvoboda@co.grays-harbor.wa.us
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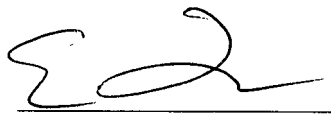
DATED this 22th day of April 2016.



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APPENDIX A

In the Supreme Court of Georgia

Decided: March 21, 2016

S15A1721. VEAL v. THE STATE.

NAHMIAS, Justice.

Appellant Robert Veal challenges his convictions for numerous crimes, including murder and rape, committed in the course of two armed robberies on November 22, 2010. He contends that the evidence at trial as to one set of crimes was insufficient to corroborate the testimony of his accomplice; we reject that contention and affirm all of the convictions. Appellant also contends that the two counts charging him with criminal street gang activity should have merged for sentencing; we reject that contention as well, although we have identified a merger error made in Appellant's favor on an armed robbery count, which the trial court should correct on remand. Finally, Appellant, who was 17 ½ years old at the time of the crimes, contends that the trial court erred in sentencing him to life without parole for malice murder. Based on the United States Supreme Court's recent decision in Montgomery v. Louisiana, 136 SCt 718 (2016), we agree that Appellant's LWOP sentence must be vacated, and we

therefore remand the case for resentencing on the murder count.[1]

1. Viewed in the light most favorable to the verdicts, the evidence at trial showed the following. On the night of the crimes, Lisa McGraw and her boyfriend, Charles Boyer, returned from a trip to a convenience store to her apartment complex in the Virginia Highlands neighborhood of Atlanta. They were walking toward her apartment when Boyer returned to his car to retrieve something he had forgotten. As McGraw continued toward the apartment, she felt a gun placed to her head and heard a voice from behind ordering her not to

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[1] On January 21, 2011, a Fulton County grand jury indicted Appellant and several other defendants for a series of allegedly gang-related crimes. Appellant was charged with the malice murder of Charles Boyer; two counts of felony murder (based on aggravated assault and possession of a firearm by a convicted felon); four counts of aggravated assault with a deadly weapon (against Boyer, John Davis, Joseph Oliver, and C.T.); possession of a firearm during the commission of a felony; five counts of armed robbery (against Boyer, Lisa McGraw, Davis, Oliver, and C.T.); rape, aggravated sodomy, and kidnapping with bodily injury of C.T.; kidnapping of Davis; false imprisonment of Oliver; and two counts of participation in criminal street gang activity. Appellant and co-indictee Tamario Wise were tried together from October 1 to 11, 2012. The jury found Appellant guilty of all counts except felony murder based on possession of a firearm by a convicted felon and the counts of aggravated assault against Oliver and C.T.. The trial court then sentenced Appellant to serve life in prison without parole for malice murder; six consecutive life sentences for the rape, aggravated sodomy, and four of the armed robbery convictions; and a total of 60 consecutive years for possession of a firearm during the commission of a felony, kidnapping, false imprisonment, and the two counts of participation in criminal street gang activity. The remaining felony murder verdict was vacated by operation of law, and the trial court merged the remaining counts – which, as explained in Division 4 below, was error with respect to the count of armed robbery against Boyer. On December 3, 2012, Appellant filed a motion for new trial, which he amended with new counsel on November 26, 2014. After an evidentiary hearing, the trial court denied the motion on March 11, 2015. Appellant filed a timely notice of appeal, and the case was docketed in this Court for the September 2015 term and submitted for a decision on the briefs.

turn around. McGraw realized that two men were behind her, and that a third man was with Boyer.

The men ordered Boyer and McGraw to walk to their apartment and to hand over their keys. McGraw gave the men her purse, and then she and Boyer tried to run away. McGraw made it safely into her neighbor's apartment, but Boyer did not. Chris Miller, a neighbor walking his dog, heard a commotion and approached to get a better look. Miller saw Boyer holding a grocery bag and facing three assailants. When Miller saw that one of the assailants had on a mask, he realized that a robbery was occurring and turned back. Miller then heard three gunshots and ran inside his apartment to call 911. The three men fled the scene. Boyer died from gunshot wounds to the torso. His injuries were consistent with his being in a struggle and trying to block a gun from shooting at him and then being shot again while trying to free himself.

Several hours later, John Davis saw three men drive up in a gold Toyota sedan as he walked outside his apartment in the Grant Park neighborhood, which is a few miles away from Virginia Highlands. The men confronted Davis and ordered him at gunpoint to go to his apartment, and all four men went inside, where they found Davis's roommate, C.T., in bed with her boyfriend, Joseph

Oliver. The assailants tied up Davis and Oliver in separate rooms. They then moved C.T. down the hallway to Davis's bedroom, where they raped and sodomized her. DNA from C.T.'s rape kit was later determined to match Appellant's.

The police put together a task force to find the perpetrators of these crimes and other similar crimes in the area. Two days later, the police tracked Boyer's missing cell phone to a black Toyota SUV, which had been abandoned at the Lakewood MARTA Station; the SUV had been stolen by Tamario Wise and another individual a few days before the Boyer shooting. The police also found C.T.'s cell phone in a bag with other stolen phones and belongings on the side of Bicknell Road.

About a month later, the police located and interviewed Raphael Cross as a suspect in the November 22 crimes. During the interview, Cross named Appellant and Wise as his accomplices in both armed robberies. Cross said that the group set out that evening with the intent of finding people to rob, and Appellant and Wise, who were armed, had killed Boyer. Following the interview, Cross was arrested and Appellant and Wise were located and arrested. Further investigation found text messages between Appellant, Wise, and Cross

talking about wiping down the black SUV to remove any fingerprints after the SUV had been shown on the television news after the murder. Appellant also sent a text to Wise that said, "PITTSBURGH JACKCITY 15 ROBERTHO F**K EVERYBODY." Evidence presented at trial showed that Appellant, Wise, and Cross were members of the Jack Boys gang, which hails from the Pittsburgh area of Atlanta. Additional evidence, including the bag of stolen cell phones and belongings found on Bicknell Road as well as testimony from other victims, showed that the Jack Boys had been involved in several armed robberies in Atlanta prior to the November 22 crimes.

At the joint trial of Appellant and Wise, Cross testified as follows. On the evening of the crimes, Appellant and Wise picked Cross up in a dark colored SUV, and the three men drove to the Virginia Highlands neighborhood. They pulled up at an apartment complex where they saw a man and a woman walking. Appellant and Wise exited the vehicle to rob the couple, and Cross got out shortly after. He saw the man struggle with Appellant and Wise, and then saw Wise shoot the man. After the shooting, the three men returned to the SUV and then switched to a gold Toyota Camry before continuing to the Grant Park area and committing the crimes against Davis, Oliver, and C.T.

Appellant and Wise did not testify. Appellant did not dispute his guilt of the charges related to the Grant Park crimes (to which he was linked by his DNA), but argued that he was not present during Boyer's shooting.

When viewed in the light most favorable to the verdicts, the evidence presented at trial and summarized above was sufficient as a matter of constitutional due process to authorize a rational jury to find Appellant guilty beyond a reasonable doubt of the crimes for which he was convicted. See Jackson v. Virginia, 443 U.S. 307, 319 (99 SCt 2781, 61 LE2d 560) (1979). See also OCGA § 16-2-20 (defining parties to a crime); Vega v. State, 285 Ga. 32, 33 (673 SE2d 223) (2009) ("'It was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence.'" (citation omitted)).

2. Appellant asserts that his convictions related to the Virginia Highlands crimes must be reversed because the State presented insufficient evidence to corroborate the accomplice testimony of Cross identifying Appellant as a participant. Under former OCGA § 24-4-8:

> The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including . . . felony cases where the only witness is an accomplice, the testimony of a single witness

> is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason.[2]

We have explained that under this statute,

> "sufficient corroborating evidence may be circumstantial, it may be slight, and it need not of itself be sufficient to warrant a conviction of the crime charged. It must, however, be independent of the accomplice testimony and must directly connect the defendant with the crime, or lead to the inference that he is guilty. Slight evidence from an extraneous source identifying the accused as a participant in the criminal act is sufficient corroboration of the accomplice to support a verdict."

Clark v. State, 296 Ga. 543, 547 (769 SE2d 376) (2015) (citation omitted).

In this case, Cross's testimony that Appellant participated with him and Wise in the Virginia Highlands crimes was corroborated by the evidence that the three men were all members of the Jack Boys gang and just hours later, Appellant committed a similar armed robbery with Cross and Wise in Grant Park, a nearby neighborhood. In addition, text messages that Appellant sent to Cross and Wise after the murder asked if they had wiped fingerprints off the black Toyota SUV in which Boyer's stolen cell phone was found. And the cell phone stolen from C.T., Appellant's Grant Park rape victim, was found on

[2] This case was tried under Georgia's old Evidence Code. In our new Evidence Code, this provision is found at OCGA § 24-14-8.

Bicknell Road with other items stolen by the Jack Boys. Viewed as a whole, the evidence corroborating Cross's testimony was sufficient to satisfy the requirement of former OCGA § 24-4-8. See Alatise v. State, 291 Ga. 428, 432 (728 SE2d 592) (2012).

3. Appellant was convicted and sentenced separately for two counts of participation in criminal street gang activity based on his participation in the murder of Boyer and the rape of C.T. while associated with the Jack Boys gang. OCGA § 16-15-4 (a) provides:

> It shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal street gang activity through the commission of any offense enumerated in paragraph (1) of Code Section § 16-15-3.

Under OCGA § 16-15-3 (1), "criminal gang activity" means "the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any of the following offenses," including murder, see § 16-15-3 (1) (J), and rape, see § 16-15-3 (1) (C).

Appellant contends that the trial court should have imposed only one sentence for criminal street gang activity, even though he committed two offenses separately enumerated under § 16-15-3 (1) at different locations and

different times against different victims. Nothing in the statute requires that all gang-related offenses be gathered into a single gang activity charge or that all such offenses must merge for sentencing. Instead, the statute makes clear that it can be violated "through the commission of *any* [enumerated] offense," OCGA § 16-15-4 (a) (emphasis added), and § 16-15-4 (m) says that "[a]ny crime committed in violation of this Code section shall be considered a separate offense." Under the circumstances of this case, Appellant's contention fails as a matter of fact and of law.

4. While the merger error suggested by Appellant does not exist, in reviewing his sentences we have identified a merger error that was made in his favor, which the trial court should correct on remand. See Hulett v. State, 296 Ga. 49, 54 (766 SE2d 1) (2014) (explaining that this Court may correct a merger error noticed on direct appeal even if the issue was not raised by the parties). The trial court merged the count charging Appellant with armed robbery against Boyer (Count 54) into the malice murder count (Count 47). But those counts do not merge, "'because malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not.'" Id. at 55-56 (citation

omitted). Accordingly, we vacate the trial court's judgment as to Count 54 and direct the court on remand to sentence Appellant for the additional armed robbery. See id. at 56.

5. Finally, Appellant, who was 17 ½ years old at the time of his crimes, contends that his sentence of life without parole (LWOP) for his malice murder conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Supreme Court of the United States recently made it clear that he is correct.

(a) Over the past decade, the Supreme Court has applied its "evolving standards of decency" theory of the Eighth Amendment to promulgate ever-increasing constitutional restrictions on the states' authority to impose criminal sentences on juvenile offenders. In 2005, the Court held that the Eighth Amendment now categorically forbids imposing a death sentence on juveniles, which the Court defined categorically as offenders who had not yet turned 18. See Roper v. Simmons, 543 U.S. 551, 568, 574 (125 SCt 1183, 161 LE2d 1) (2005) (deeming Stanford v. Kentucky, 492 U.S. 361 (109 SCt 2969, 106 LE2d 306 (1989), which just 16 years earlier had upheld the death penalty for offenders older than 16, "no longer controlling"). Five years later, the Court

held that the Eighth Amendment now categorically prohibits sentencing a juvenile to serve life in prison without possibility of parole for an offense other than homicide. See Graham v. Florida, 560 U.S. 48, 82 (130 SCt 2011, 176 LE2d 825) (2010). And two years after that, the Court held that the Eighth Amendment also bars "*mandatory* life without parole [sentences] for those under the age of 18 at the time of their crimes." Miller v. Alabama, 132 SCt 2455, 2460 (2012) (emphasis added). See also id. at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

(b) This case was tried three months after Miller came down. After the jury found Appellant guilty of malice murder (and many other crimes) on October 11, 2012, the trial court put off his sentencing for more than five weeks, to November 19. At the sentencing hearing, however, neither party offered any new evidence, nor did either party or the court mention Miller or its holding.

In arguing in mitigation of punishment, Appellant's trial counsel did, however, focus on the fact that his client was "very young at the time [of the crimes]. He was 17." Counsel noted Appellant's remorse for the rape of C.T.,

although Appellant then (as now) claimed to have had no involvement in the murder of Charles Boyer and the other Virginia Highland crimes. Counsel asserted that Appellant was vulnerable to Wise's solicitation to become involved in the crimes, and asked the court to "show some mercy" to Appellant because he was not a "lost cause" and "given some time, which he is obviously going to get, . . . he is going to be a changed person at some point." Counsel added that "[a]t 17, . . . you think differently than when you are 40. And . . . when he gets to be an older man, Judge, he is going to wake up and realize that." Noting that the State was going to ask for a life without parole sentence, Appellant's counsel argued that "it's going to be a waste of a life, . . . because I don't believe that he is going to be the kind of person that would do that for his entire life, these kind[s] of crimes."

In response, the prosecutor noted that the court had heard from "many, many victims" at Wise's sentencing hearing the week before and urged the court to consider that information in sentencing Appellant.[3] The prosecutor

[3] The transcript of Wise's sentencing hearing is not in the record on appeal, so we cannot tell if Appellant and his counsel were present. If not, the trial court's reliance in sentencing Appellant on information presented outside his presence could raise concerns about his constitutional right to be present, although that right may be waived in some circumstances and Appellant has not raised the issue. See, e.g., Dawson v. State, 283 Ga. 315, 321-322 (658 SE2d 755) (2008). We note

emphasized that this is a "brutal case" with respect to both the Virginia Highlands and Grant Park crimes, and he recommended the maximum LWOP sentence for the murder, arguing that the deterrent effect of imposing a penalty for murder greater than the life sentences Appellant faced for his other crimes "outweighs the slim possibility that he may have some moment of self-reflection 30 years down the road."

When it came time for sentencing, the trial court made no explicit mention of Appellant's age or its attendant characteristics, saying only: "based on the evidence and, in particular – please make sure all cell phones are turned off [] – it's the intent of the court that the defendant be sentenced to the maximum." The court then imposed a sentence of life without parole for the murder to run consecutively to the six consecutive life-with-parole sentences plus the 60 more consecutive years the court imposed for the other convictions (with another armed robbery sentence still to be imposed on remand).

Two years later, with the assistance of new counsel, Appellant filed an amended motion for new trial, raising for the first time a claim that his LWOP

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the issue only as a caution with regard to Appellant's re-sentencing on remand.

murder sentence was unconstitutional under Miller. At the hearing on the motion, neither party offered any new evidence on this issue. Appellant's new counsel argued, however, that the trial court had not made any "specific findings of fact" at sentencing as to why the LWOP punishment was proper for Appellant, who was "technically a minor" at the time of the crimes. As a remedy, Appellant asked for a new sentencing hearing.

The trial court denied the motion. Citing this Court's decisions in Jones v. State, 296 Ga. 663, 666-667 (769 SE2d 901) (2015), and Brinkley v. State, 291 Ga. 195, 196 (728 SE2d 598) (2012), the court first held that Appellant's constitutional challenge to his sentence was untimely, as it had not been raised before sentencing but rather for the first time two years later in his amended motion for new trial. The court then alternatively denied the claim on the merits, stating: "As the Court indicated at that time, its sentence was based upon the evidence in the case which included [Appellant's] involvement in several savage and barbaric crimes and also included evidence of [Appellant's] age."

(d) Had this appeal been decided before Montgomery, we might have upheld the trial court's rulings on Appellant's belated Miller-based Eighth Amendment claim. To begin with, because Miller did not purport to prohibit

LWOP sentences for juvenile murderers, so long as sentencing courts properly exercise discretion in imposing such sentences, Miller appeared to establish a *procedural* rule – a *process* which, if the sentencing court did not follow it correctly, would result in a juvenile's LWOP sentence being not void but voidable, in that the same sentence might be imposed on remand in a given case if the court the second time around properly followed the process. After all, the Miller majority said: "Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty." Miller, 132 SCt at 2471.

As this Court explained in Von Thomas v. State, 293 Ga. 569 (748 SE2d 446) (2013),

> Whether a sentence amounts to "punishment that the law does not allow" [rendering the sentence void] depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence imposed is one that legally follows from a finding of such factual or adjudicative predicates.

Id. at 571-572. Although claims that a sentence is void (i.e., illegal) are not subject to general waiver or procedural default rules, a defendant does forfeit a

claim that his sentence was merely voidable (i.e., erroneous) if he does not raise the claim in timely and proper fashion. See id. at 573. See also Tolbert v. Toole, 296 Ga. 357, 361 n.8 (767 SE2d 24) (2014) (explaining that "Georgia's customary procedural default rule, which holds that claims not raised at trial and enumerated on appeal are waived, does not apply to a claim that a criminal conviction or sentence was void on jurisdictional or other grounds," although such claims may be subject to other procedural limitations); Nazario v. State, 293 Ga. 480, 485-486 (746 SE2d 109) (2013) (explaining that void conviction and void sentence claims may be considered for the first time on direct appeal and in other proper post-trial proceedings). Nor could Appellant excuse his failure to raise his Miller claim at or before his sentencing by asserting that Miller was new law for his case, see Brinkley, 291 Ga. at 197 n.1, because Miller was decided several months before his sentencing. Thus, as the trial court recognized, Appellant's Miller claim appeared to be procedurally barred because it was raised too late under this Court's procedural holdings in Jones and Brinkley.

We might also have upheld the trial court's alternative ruling on the merits of Appellant's Miller claim. We have explained that Georgia's murder

sentencing scheme does not implicate the core holding of Miller, because "OCGA § 16-5-1 does not under any circumstance *mandate* life without parole but gives the sentencing court discretion over the sentence to be imposed after consideration of all the circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth." Bun v. State, 296 Ga. 549, 550-551 (769 SE2d 381) (2015) (emphasis in original). See also Foster v. State, 294 Ga. 383, 387 (754 SE2d 33) (2014) (similarly rejecting a facial Eighth Amendment challenge to OCGA § 16-5-1 based on Miller).[4]

As for the trial court's exercise of that discretion, although at the sentencing hearing the court did not explicitly reference Appellant's age (which was just six months short of adulthood) in imposing the LWOP murder sentence, the court had heard considerable argument regarding that factor as well as other circumstances of Appellant and the case, and the court had also heard the evidence at trial; the court then explained in its order denying the motion for new trial that the life without parole "sentence was based upon the

[4] What was OCGA § 16-5-1 (d) at the time of Appellant's sentencing is now § 16-5-1 (e) (1); it says, with emphasis added, "A person convicted of the offense of murder shall be punished by death [a penalty not applicable to juveniles after Roper], by imprisonment for life without parole, *or* by imprisonment for life." The other sentencing provision of the murder statute, OCGA § 16-5-1 (e) (2), establishes a maximum sentence of 30 years for second degree murder.

evidence in the case which included [Appellant's] involvement in several savage and barbaric crimes and also included evidence of [Appellant's] age." In previous cases, this Court indicated that the sentencing court's discretion under Miller was fairly broad, so long as the trial court considered the defendant's youth. See Jones, 296 Ga. at 667 (affirming an LWOP murder sentence against a Miller claim where the trial court "explained that it based its sentence on balancing Appellant's youth against the 'vicious, mean, violent behavior and the adult conduct that was engaged in,' which included the murder of not one but two innocent bystanders"); Bun, 296 Ga. at 551 n.5 (suggesting that an as-applied Miller claim would have failed where "the trial court's order and [the] sentencing transcript make clear that the trial court considered Bun's youth and its accompanying attributes in making its sentencing decision and whatever the significance attributed to Bun's youth, the trial court found it was outweighed by the severity of his crimes, his criminal history, and his lack of remorse").

But then came Montgomery.

(e) Montgomery's principal holding – that Miller applies retroactively in state habeas corpus proceedings – is irrelevant to this case, both because Miller was decided before Appellant was sentenced and because this

case is here on direct appeal. Nevertheless, the explication of Miller by the majority in Montgomery demonstrates that our previous understanding of Miller – and the trial court's ruling on Appellant's Miller claim – was wrong both as to the issue of procedural default and as to which juvenile murderers a court actually has discretion to sentence to serve life without parole.

First, while Montgomery acknowledges that "Miller's holding has a procedural component," it explains that the process discussed in Miller was really just a "procedure through which [a defendant] can show that he belongs to the [constitutionally] protected class." 136 SCt at 734, 735. Put another way, although Miller did not outlaw LWOP sentences for the category of *all* juvenile murderers, Montgomery holds that "Miller announced a substantive rule of constitutional law" that "the sentence of life without parole is disproportionate for the *vast majority* of juvenile offenders," with sentencing courts utilizing the process that Miller set forth to determine whether a particular defendant falls into this *almost-all* juvenile murderer category for which LWOP sentences are banned. Id. at 736 (emphasis added).

> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those

> who may not. The hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Id. at 735.

And a sentence imposed in violation of this *substantive* rule – that is, an LWOP sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate – "is not just erroneous but contrary to law and, as a result, void." Id. at 731. It follows, Montgomery concludes, that state collateral review courts that are open to federal law claims must apply Miller retroactively if a petitioner challenges his sentence under the Eighth Amendment. See id. at 731-732. And it follows, as a matter of Georgia procedural law, that Appellant's Miller claim – now understood to be a substantive claim that, if meritorious, would render his sentence void – could be properly raised in his amended motion for new trial and in this direct appeal, despite his failure to raise the claim before he was sentenced. See Nazario, 293 Ga. at 487.[5] To the extent Jones, Brinkley, or any other Georgia appellate case

[5] We note in this regard that under Georgia law, a finding of a statutory aggravating factor that would support a death penalty was, until 2009, a statutory requirement to sentence a murderer

holds otherwise, it is hereby disapproved.

The Montgomery majority's characterization of Miller also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole. Miller noted that, "given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." Miller, 132 SCt at 2469 (emphasis added). Miller also indicated that what was essential was that the sentencing court have the discretion to consider an offender's "youth and its attendant characteristics, along with the nature of his crime," in deciding whether a lesser sentence (like life with the possibility of parole) was more appropriate than a life without parole sentence. Id. at 2460.

The Montgomery majority explains, however, that by *uncommon*, Miller meant *exceptionally rare*, and that determining whether a juvenile falls into that

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to life without parole – and the failure to make such a finding contemporaneously with the imposition of a LWOP sentence rendered the sentence void and subject to correction by motion to vacate sentence made long after the conviction. See Pierce v. State, 289 Ga. 893, 896-897 (717 SE2d 202) (2011).

exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*.[6] Thus, Montgomery emphasizes that a life without parole sentence is permitted only in "*exceptional* circumstances," for "the *rare* juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is *impossible*"; for those "*rarest* of juvenile offenders . . . whose crimes reflect *permanent incorrigibility*"; for "those *rare* children whose crimes reflect *irreparable corruption*" – and not, it is repeated twice, for "the vast majority of juvenile offenders." 136 SCt at 733-736 (emphasis added). The Supreme Court has now made it clear that life without parole sentences may be constitutionally imposed

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[6] While it is not sufficient simply to consider a juvenile offender's "'diminished culpability and greater prospects for reform,'" it is important that the sentencing court explicitly consider the "three primary ways" that these characteristics of children are relevant to sentencing, as explained in Miller and Montgomery:

> "First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity."

Montgomery, 136 SCt at 733 (quoting Miller, 132 SCt at 2464) (additional quotation marks omitted).

only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers. To the extent this Court's decisions in Jones and Bun suggested otherwise, they are hereby disapproved.

In this case, the trial court appears generally to have considered Appellant's age and perhaps some of its associated characteristics, along with the overall brutality of the crimes for which he was convicted, in sentencing him to serve life without parole for the murder of Charles Boyer – a crime for which Appellant may have been convicted only as an aider-and-abetter. The trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in Miller as refined by Montgomery. Whether such a determination may be made in this case is a matter that should be addressed in the first instance by the trial court on remand. Accordingly, we vacate the life without parole sentence imposed on Appellant for malice murder and remand the case for resentencing on that count in

accordance with this opinion, Miller, and Montgomery.

Judgment affirmed in part and vacated in part, and case remanded for resentencing. All the Justices concur.

APPENDIX B

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GREGORY NIDEZ VALENCIA JR.,
Petitioner.

THE STATE OF ARIZONA,
Respondent,

v.

JOEY LEE HEALER,
Petitioner.

No. 2 CA-CR 2015-0151-PR
No. 2 CA-CR 2015-0182-PR
(Consolidated)
Filed March 28, 2016

Petitions for Review from the Superior Court in Pima County
Nos. CR051447 and CR48232
The Honorable Catherine M. Woods, Judge
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Dean Brault, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Petitioner Gregory Nidez Valencia Jr.

Steven R. Sonenberg, Pima County Public Defender
By David J. Euchner and Katherine A. Estavillo, Assistant Public Defenders, Tucson
Counsel for Petitioner Joey Lee Healer

OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Gregory Valencia Jr. and Joey Healer seek review of trial court orders denying their respective petitions for post-conviction relief, in which they argued *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), constitutes a significant change in the law applicable to their natural-life prison sentences. Because *Miller*, as clarified by the United States Supreme Court in *Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 734 (2016), "bar[s] life without parole" for all juvenile offenders except those "whose crimes reflect permanent incorrigibility," we accept review and grant relief.

Procedural Background

¶2 Valencia and Healer were each convicted of first-degree murder in addition to other offenses and were sentenced to natural

life in prison. Both were juveniles at the time of their offenses. Although we vacated one of Valencia's non-homicide convictions on appeal, we affirmed his remaining convictions and sentences. *State v. Valencia*, No. 2 CA-CR 96-0652 (memorandum decision filed Apr. 30, 1998). We affirmed Healer's convictions and sentences on appeal. *State v. Healer*, No. 2 CA-CR 95-0683 (memorandum decision filed Dec. 24, 1996).

¶3 In 2013, Valencia filed two notices of post-conviction relief, along with a supplement, raising various claims, including that *Miller* constituted a significant change in the law pursuant to Rule 32.1(g), Ariz. R. Crim. P. The trial court, treating Valencia's second notice as a petition for post-conviction relief, summarily denied relief. On review, we granted partial relief, determining Valencia had not been given an adequate opportunity to raise his claim based on *Miller* because the court had erred in construing his second notice as his petition for post-conviction relief. We thus remanded the case to the trial court for further proceedings related to that claim, but otherwise denied relief. *State v. Valencia*, No. 2 CA-CR 2013-0450-PR (memorandum decision filed May 6, 2014).

¶4 Healer also sought post-conviction relief in 2013, seeking to raise a claim pursuant to *Miller* and requesting that counsel be appointed. The trial court, however, summarily dismissed his notice, concluding *Miller* did not apply. We granted relief, determining Healer was entitled to counsel and to file a petition for post-conviction relief and remanding the case to the trial court for further proceedings. *State v. Healer*, No. 2 CA-CR 2013-0372-PR (memorandum decision filed Jan. 28, 2014).

¶5 Valencia and Healer then filed separate petitions in which they raised the same argument—that *Miller* constituted a significant change in the law applicable to their respective natural-life sentences. They contended that under *Miller*, Arizona's sentencing scheme is unconstitutional because a life sentence was essentially a sentence of life without a meaningful opportunity for release due to the abolition of parole. Each further argued our sentencing scheme is unconstitutional because "it completely fails to take any account of the attendant characteristics of youth." Last, both argued "the process by which [they] w[ere] sentenced was

unconstitutional" because the court "failed to give proper weight to youth and its attendant characteristics."

¶6 The trial court in each proceeding summarily denied relief. The court in Valencia's proceeding noted that, "at the time of sentencing" the court believed "that it had the discretion to impose natural life or, alternatively, life with the opportunity for parole after 25 years." It further observed that Valencia had been given individualized sentencing consideration as required by *Miller* and that, after that consideration, the court found his youth to be a mitigating factor but, in consideration of other factors, had nonetheless determined a natural-life sentence was appropriate.

¶7 The trial court in Healer's proceeding determined that any constitutional infirmity in Arizona's sentencing scheme had been resolved by recent statutory changes reinstating parole for juvenile offenders given a life sentence with an opportunity for release. The court further determined that, in any event, the sentencing court had found Healer's age to be a mitigating factor and had imposed a natural-life sentence in compliance with *Miller*. Healer and Valencia each filed petitions for review, which we consolidated at their request.

Discussion

¶8 In their petitions for review, Healer and Valencia repeat their argument that *Miller* is a significant change in the law entitling them to be resentenced. *See* Ariz. R. Crim. P. 32.1(g). In *Miller*, the United States Supreme Court determined that a sentencing scheme "that mandates life in prison without possibility of parole for juvenile offenders" violated the Eighth Amendment's prohibition against cruel and unusual punishment. ___ U.S. at ___, 132 S. Ct. at 2469; *see also State v. Vera*, 235 Ariz. 571, ¶ 3, 334 P.3d 754, 755-56 (App. 2014). The Court further stated that, before a juvenile offender is sentenced to natural life, courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, ___ U.S. at ___, 132 S. Ct. at 2469.

¶9 While Healer's and Valencia's petitions were pending, the Supreme Court accepted review of another case involving juveniles sentenced to life imprisonment without the possibility of parole in order to determine whether *Miller* should be applied retroactively. *Montgomery v. Louisiana*, ___ U.S. ___, 135 S. Ct. 1546 (2015) (granting writ of certiorari); *see also Montgomery*, ___ U.S. at ___, 136 S. Ct. at 727. We stayed the current proceeding and ordered the parties to provide supplemental briefs when that decision issued.

¶10 The Supreme Court decided *Montgomery* in January 2016. It explained that, in *Miller*, it had determined a natural-life sentence imposed on a juvenile offender "violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 734, *quoting Miller*, ___ U.S. at ____, 132 S. Ct at 2469. Thus, the Court clarified, the Eighth Amendment requires more than mere consideration of "a child's age before sentencing him or her to a lifetime in prison," but instead permits a natural-life sentence only for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* The Court further determined that the rule announced in *Miller* was a substantive constitutional rule that was retroactively applicable pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 735-36.

¶11 Valencia and Healer argue on review that, pursuant to *Miller*, Arizona's sentencing scheme for juveniles convicted of first-degree murder is unconstitutional because it permits the imposition of a natural-life term without requiring the court to "take any account of the attendant characteristics of youth." They also assert their respective sentencing courts did not sufficiently consider those characteristics in imposing natural-life sentences.[1] To be entitled to

[1]Valencia and Healer additionally maintain that, pursuant to *Miller*, the mandatory minimum sentence of twenty-five years to life for murder is unconstitutional for juvenile offenders. But the Supreme Court in *Miller* did not address mandatory minimum sentences for juveniles; its discussion was limited to natural-life

relief pursuant to Rule 32.1(g), Valencia and Healer must show there "has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence."

¶12 As the state concedes, the Supreme Court settled in *Montgomery* the question whether the rule announced in *Miller* applies retroactively. Thus, the question before us is whether that rule constitutes a significant change in Arizona law. A significant change in the law is a "transformative event, a 'clear break from the past.'" *State v. Werderman*, 237 Ariz. 342, ¶ 5, 350 P.3d 846, 847 (App. 2015), *quoting State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009). "Such change occurs, for example, 'when an appellate court overrules previously binding case law' or when there has been a 'statutory or constitutional amendment representing a definite break from prior law.'" *Id.*, *quoting Shrum*, 220 Ariz. 115, ¶¶ 16-17, 203 P.3d at 1178-79.

¶13 At the time of Valencia's and Healer's offenses, Arizona's sentencing scheme required the court to consider their age in determining which sentence to impose. *See former* A.R.S. § 13-703(G)(5); 1988 Ariz. Sess. Laws, ch. 155, § 1; *see also* A.R.S. § 13-702(E)(1); 1984 Ariz. Sess. Laws, ch. 43, § 1. And courts have long understood that the sentencing considerations for juveniles are markedly different from those for adults, noting in particular a sentencing court should consider a juvenile defendant's age as well as his or her "level of maturity, judgment and involvement in the crime." *State v. Greenway*, 170 Ariz. 155, 170, 823 P.2d 22, 37 (1991); *see also Thompson v. Oklahoma*, 487 U.S. 815, 823-24, 833-34 (1988).

¶14 But the mere requirement that a sentencing court consider a juvenile defendant's youth before imposing a natural-life sentence does not comply with the Supreme Court's recent directive forbidding a natural-life sentence "for all but the rarest of juvenile offenders." *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 734. Instead, as the Court explained, the sentencing court must determine whether

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sentences. *See* ___ U.S. at ___, 132 S. Ct. at 2469. Accordingly, we reject this argument.

the juvenile defendant's "crimes reflect [] transient immaturity," or whether the defendant's crimes instead "reflect permanent incorrigibility." *Id.* Only in the latter case may the sentencing court impose a sentence of natural life. *See id.*

¶15 In its supplemental brief following the Court's decision in *Montgomery*, the state maintains that *Miller* is nonetheless inapplicable to Valencia and Healer because their natural-life terms were not mandatory. We agree that the core issue presented in *Miller* concerned the mandatory imposition of a natural-life sentence. But there is no question that the rule in *Miller* as broadened in *Montgomery* renders a natural-life sentence constitutionally impermissible, notwithstanding the sentencing court's discretion to impose a lesser term, unless the court "take[s] into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 733, *quoting Miller*, ___ U.S. at ___, 132 S. Ct. at 2469. Moreover, after taking these factors into account, the court can impose a natural-life sentence only if it concludes that the juvenile defendant's crimes reflect permanent incorrigibility.[2] *See id.* at ___, 136 S. Ct. at 734.

¶16 The state also contends that, in any event, Valencia's and Healer's respective sentencing courts "took [their] ages into account" in imposing that term. As we have explained, however, the Eighth Amendment, as interpreted in *Montgomery*, requires more than mere consideration of age before imposing a natural-life sentence. *See id.* at ___, 136 S. Ct. at 734-35. The state does not argue that the facts presented at Valencia's and Healer's respective sentencing hearings would require, or even support, a finding that

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[2] Justice Scalia, in his dissent, asserts that the majority's reasoning can be read as a "way of eliminating life without parole for juvenile offenders." *Montgomery*, ___ U.S. at ____, 136 S. Ct. at 744 (Scalia, J., dissenting) (joined by Justice Thomas and Justice Alito). Although the majority states "it will be the rare juvenile offender who can receive [a natural-life] sentence," we do not view that pronouncement an absolute bar against such a sentence. *Id.* at ___, 136 S. Ct. at 734.

their crimes reflect permanent incorrigibility. In any event, in light of the heretofore unknown constitutional standard announced in *Montgomery*, the parties should be given the opportunity to present evidence relevant to that standard. *See, e.g., State v. Steelman*, 120 Ariz. 301, 320, 585 P.2d 1213, 1232 (1978) (remanding for redetermination of sentence in light of recent case law).

Conclusion

¶17 The Supreme Court's determination in *Montgomery* that a natural-life sentence imposed on a juvenile defendant is unconstitutional unless the juvenile's offenses reflect permanent incorrigibility constitutes a significant change in Arizona law that is retroactively applicable.[3] *See* Ariz. R. Crim. P. 32.1(g); *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 735-36. Valencia and Healer are therefore entitled to be resentenced. Accordingly, we accept review and grant relief, and this case is remanded to the trial court for further proceedings consistent with this decision.

[3]We need not address Valencia and Healer's argument that the sentencing scheme in place at the time of their sentences was unconstitutional. And we decline to address pending legislation that may affect the issues presented in this case.